No. 15146.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLEN BALLARD, and VIC BUONO,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON BEHALF OF

APPELLANT CLIFFORD L. DUKE, JR.

BARTON C. SHEELA, JR.
GEORGE WILLIAMS RUTHERFORD
CLINTON F. JONES

617 Bank of America Building
San Diego 1, California

Attorneys for Appellant
Clifford L. Duke, Jr.

INDEX

Topical Index
(continued)

Page

I.

Topical Index
(continued)

Topical Index
(continued)

Topical Index
(continued)

TABLE OF AUTHORITIES CITED

Cases
(cont'd) Page

Constitutions & Statutes

Constitutions & Statutes
(continued)

Texts

PREFACE

This is the opening brief on behalf of Appellant Clifford L. Duke, Jr. Two other appellants in the same matter, Louis Glenn Ballard and Vic Buono, have filed separate briefs.

In the interest of brevity Appellant Clifford L. Duke, Jr. will be referred to as "Duke". Appellants Louis Glenn Ballard and Vic Buono will be referred to as "Ballard" and "Buono" respectively

Most of the questions involved in the separate appeals of Duke, Ballard and Buono are different. Counsel have attempted, insofar as possible, to avoid repetition of arguments in those instances where an issue is common to all three appeals.

The record on appeal is as follows:

1. Reporter's Transcript

The typewritten reporter's transcript of all proceedings had in the District Court consists of 35 volumes. Proceedings prior to date set for trial are in one volume and numbered pages 1A to 146A, inclusive. Proceedings had from the date of trial to the conclusion of all proceedings in the District Court are reported in 33 volumes, numbered pages 1 through 5349, inclusive. Proceedings had during the selection of the jury are in a separate volume numbered pages 36, 36-A-1 through 36-A-171, inclusive. Citations to any of the above named reporter's transcripts will be cited as (Tr.)

2. Clerk's Transcript

The typewritten clerk's transcript contains copies of all pleadings and papers on file and the clerk's minutes of proceedings below. This transcript is in one volume and numbered pages 1 through 378, inclusive. References to the clerk's transcript will be cited as (Cl. Tr.).

3. Exhibits

The record includes all original exhibits in evidence or offered in evidence in the trial court. References to the exhibits will be cited as follows:

(a) Government's exhibits: (G. ex. 1, etc.)

(b) Duke's exhibits: (D. ex. A, etc.)

(c) Ballard's exhibits: (Ba. ex. A, etc.)

(d) Buono's exhibits: (Bu. ex. A., etc.)

Because of the voluminous record on this appeal counsel for Duke and Ballard have prepared a joint Appendix to their respective briefs, consisting of verbatim excerpts from the official record without editorial comment.

Counsel endeavored to include in the Appendix all portions of the official record that might have even a remote bearing on the various questions presented in these appeals and have not intended to omit any portion that might be material to the Appellee. Attempting to make certain of this some portions of the record of doubtful materiality have been included.

The Appendix is arranged in chronological order and includes portions of the clerk's transcript as well as the reporter's transcript. It is submitted solely for whatever aid it might be in conserving the time of the Court in reviewing a six thousand page record.

The Appendix is not an additional brief, nor is it in lieu of any portion of the briefs, and should be used only if this Honorable Court deems it of any utility; otherwise, it should be disregarded.

References to the Appendix will be cited as (App. Vol. ___, p. ___). However, all citations to the Appendix will include a citation to the official record.

No. 15146

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFFORD L. DUKE, JR., LOUIS GLENN BALLARD AND VIC BUONO,

Appellant

vs.

UNITED STATES OF AMERICA,

Appelle

OPENING BRIEF ON BEHALF OF APPELLANT CLIFFORD L. DUKE, JR.

JURISDICTIONAL STATEMENT

A. Jurisdiction of the District Court

Duke was charged in each count of a ten count indictment returned by the Federal Grand Jury for the Southern District of California on May 25, 1955. (Cl. Tr. p. 2)

Three counts (I, IV and VII) charge a violation of United States Code, Title 18, Section 371, conspiracy to smuggle merchandise into the United States in violation of United States Customs Laws.

The remaining seven counts charge smuggling and illegal importation or the receiving, concealin

and facilitating the transportation after illegal importation of merchandise in violation of United States Code, Title 18, Section 545. The merchandise referred to in each count is stated to be birds of the psittacine family.
(Cl. Tr. pp. 2-13)

Each of the ten counts alleged that the offenses charged were committed in the Southern District of California, Southern Division. The District Court, therefore, had jurisdiction of the cause by reason of United States Code, Title 18, Section 3231 which confers on the District Court original jurisdiction of all offenses against the laws of the United States.

B. Jurisdiction of Court of Appeals

Duke was convicted of all counts, and on September 30, 1955 the court pronounced judgment on each count sentencing Duke to imprisonment for a total term of eleven years.
(Cl. Tr. pp. 311-312)

Notice of appeal was filed October 10, 1955, and the record on appeal was duly filed and the cause docketed on June 1, 1956.

Jurisdiction to review the judgment of conviction is conferred upon this Honorable Court by United States Code, Title 28, Section 1291.

STATEMENT OF THE CASE

The Indictment

Count I (18 U. S. C. 371)

Commencing in January, 1953 and continuing to April, 1953 Duke conspired with thirteen persons named as unindicted co-conspirators in violation of United States Code, Title 18, Section 371. The offense, the commission of which was stated to be the object of the conspiracy was to smuggle into the United States psittacine birds which should have been invoiced and to fradulently import, and to receive, conceal, sell and transport after importation said psittacine birds, contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

Among the thirteen unindicted co-conspirators named were Nicholas Spicuzza, John Hadzima, George Todd and Robert Helm, who testifed as Government witnesses during the trial.

Count II (18 U. S. C. 545)

On April 1, 1953 Duke smuggled thirty crates of psittacine birds which should have been invoiced and that said birds were imported in violation of United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

Count III (18 U. S. C. 545)

On April 1, 1953 Duke received, concealed and facilitated the transportation and concealment of thirty crates of psittacine birds (Same birds mentioned in Count II) with knowledge they had

been imported contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof.

Count IV (18 U. S. C. 371)

This count charged a conspiracy identical to the conspiracy charged in Count I; the only difference being the dates, parties charged and the number of unindicted co-conspirators and overt acts. The differences are as follows:

(a) Dates - Commencing on or about April, 1953 and continuing to December, 1954.

(b) Parties Charged - Duke, Ballard and Buono.

(c) Unindicted co-conspirators - Five persons named, among which were John Hadzima, Robert Helm and Mary Ascani.

(d) Number of overt acts - Seven, the latest date of any overt act being June, 1953.

Counts V and VI
(18 U. S. C. 545)

Count V is identical to Count II and Count VI is identical to Count III, except for the date, and parties charged. In Counts V and VI the differences are as follows:

(a) Date - May 13, 1953.

(b) Parties Charged - Duke, Ballard and Buono.

Count VII (18 U. S. C. 371)

This Count charged a conspiracy identical to the conspiracies charged in Counts I and IV except for the dates, parties charged, unindicted co-conspirators and overt acts. In Count VII these differences are as follows:

(a) Dates- Commencing on or about June, 1953 and continuing to about October, 1953.

(b) Parties charged - Duke and Buono.

(c) Unindicted Co-conspirators - Four persons named, among which were Nicholas Spicuzza, Robert Helm and George Todd.

(d) Overt Acts - Six in number, the latest date of any overt act alleged being September 28, 1953.

Counts VIII, IX and X
(18 U. S. C. 545)

These Counts charge that Duke and Buono smuggled various and sundry psittacine birds into the United States which should have been invoiced and that in each instance said psittacine birds were imported contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484 thereof. Each of said counts are identical except for the dates which are as follows:

(a) Count VIII - on or about June 25, 1953.

(b) Count IX - on or about August 28, 1953.

(c) Count X - on or about September 28, 1953.

The offense, the commission of which was stated to be the object of each of the three conspiracies charged in Counts I, III and IV, purported to be an offense proscribed by United States Code, Title 18, Section 545.

Each of the remaining seven Counts, II, III, V, VI, VIII, IX and X, inclusive, purported to charge a violation of United States Code, Title 18, Section 545.

QUESTIONS INVOLVED

(Questions concerning specific provisions of the Constitution of the United States)

1. Was Duke deprived of the right to be represented by counsel contrary to the provisions of Article V and Article VI of the Constitution of the United States?

2. By reason of the provisions of Article V and Article VI of the United States Constitution, does an accused in a criminal trial have a right to act as his own counsel?

(a) Is the right absolute or subject to the trial court's discretion?

(b) In electing to act as his counsel, was Duke exercising a right that was absolute, or was it subject to the discretion of the trial court?

(c) If discretionary, was it an abuse of discretion and error for the trial court to deny Duke's request made at the inception

of the trial to act as his own counsel?

(d) If error, was Duke substantially prejudiced and deprived of a fair trial by reason thereof?

3. If an accused is an attorney and his trial is had in a Federal court before which he is admitted to practice, does he forfeit his right to have the assistance of co-counsel when he elects to represent himself?

(Questions concerning the construction of Statutes)

4. When there are several laws which punish as crimes the same act, one being general and the others being specific, can an accused be punished under the general law which provides for a greater period of penal servitude?

(a) Is the importation of psittacine birds punishable as a felony under 18 U. S. C. 545, which is a general statute prohibiting smuggling and importation of merchandise contrary to law in view of

(1) a specific statute making it a misdemeanor to import or transport birds, animals or fish contrary to any act of Congress or in violation of the regulations of the Secretary of the Treasury;

(2) a specific regulation (42 C. F. R. 71. 152) enacted pursuant to statutory authority (42 U. S. C. 264) making it a misdemeanor to import psittacine birds into the United States?

(b) In view of the specific laws pertaining to psittacine birds above mentioned, was it error for the court to assess punishment on the conspiracy charges in excess of that permitted by the second paragraph of 18 U. S. C. 371?

5. With respect to Counts II, III, V, VI, VIII, IX and X (the substantive counts) of the indictment, do the allegations that merchandise was imported into the United States in violation of United States Code, Title 19, Chapter 4, and particularly 1461 and 1484 thereof state facts sufficient to constitute an offense against the United States?

(Questions concerning the rulings of the Court and conduct of the prosecuting attorney)

6. When a proper foundation has been laid therefor, is evidence admissible which tends to prove that a Government witness had a corrupt motive in testifying; and if the court precludes the laying of such foundation on cross-examination and directs a defendant to prove such matters affirmatively in his defense, is it error to then reject such proof when offered affirmatively by the defendant?

7. Did the court err in refusing to admit evidence, tending to prove that during a specific period Duke was heavily in debt and compelled to borrow funds from the bank to meet current expenses, to rebut the testimony of a Government witness that he had paid Duke fabulous sums of money during the same period?

8. Did the court err in refusing to admit evidence tending to prove that just prior to the

trial a Government witness was engaged in illegal conduct in violation of United States laws for which he had not been prosecuted?

9. Was it error to permit a Government witness to consult with his attorney during cross-examination before answering questions concerning matters about which he testified on direct?

10. Did the court err while instructing the jury in:

(a) Refusing to give a requested interim instruction concerning the weight which the jury should give inferior evidence?

(b) Commenting that strong suggestions had been made by some counsel that some of the Government witnesses had conspired together and the jury should consider such accusation and consider what access witnesses in the penitentiary had to one another?

(c) Refusing to give requested instruction to the effect that the testimony of an accomplice must be corroborated?

11. During argument to the jury was it misconduct for the prosecutor to:

(a) Deliberately make an inflammatory argument upon a subject which had been excluded from evidence?

(b) Make derogatory and inflammatory factual statements about a defendant which were not only outside the evidence but which

which the prosecutor knew were not true.

(c) Express his personal belief concerning the guilt of the defendant?

In the circumstances of this case did such acts of misconduct substantially prejudice Duke and deprive him of a fair trial?

12. Was it misconduct in the presence of the jury for the prosecutor:

(a) To call a witness to the stand not to illicit any evidence but solely for the purpose of disclosing to the jury that the witness had been subpoenaed by Duke but not called to testify?

(b) While cross-examining Duke to assume by his question the existence of facts concerning which no evidence was offered or attempted the question being asked solely for the purpose of getting before the jury derogatory and prejudicial matter concerning Duke?

(c) To make statements prejudicial to the defendant when interposing an objection to evidence?

Was Duke substantially prejudiced and deprived of a fair trial by reason of the above conduct?

MANNER IN WHICH QUESTIONS RAISED ON APPEAL

The questions (1, 2 & 3) concerning deprivation of right to counsel in violation of the United States Constitution was raised as follows:

1. Prior to trial statements and requests made by Duke in the court's chambers. (Tr. 28)

2. Specific motion made and denied after the selection of the jury, but prior to any proceedings in their presence. (Cl. Tr. 110)

3. Motion for new trial. (Cl. Tr. p. 289)

The questions (4 & 5) concerning the construction of Statutes were raised as follows:

1. Timely motion to dismiss indictment which was denied. (Cl. Tr. p. 28 & 68)

2. Motion in arrest of judgment which was denied. (Cl. Tr. p. 204)

The questions (6, 7, 8 & 9) concerning the rulings of the court during examination of witnesses and in admitting or rejecting evidence were raised in each instance by specific questions asked and detailed offers of proof after which the court ruled the evidence inadmissible.

Question 6 -- (Tr. pp956-957; App. 242-243) (Tr. 2657-2659; App. 452-454) (Tr. p. 3361; App. 504-505) (Tr. 3366-3367; App. 508) (Tr. 3372-3373; App. 512) (Tr. 3378-3388; App. 515-520) (Tr. 3391-3392; App. 52

(Tr. 3398-3448; App. 525-548) Tr. 3517-3531; App. 553 - 558) (Tr. 3581-3585; App. 565-570) (Tr. 4280; 4291; 4296-4298; App. 649-652)

Question 7 -- (Tr. 3294-3297; App. 488-492)

Question 8 -- (Tr. 2166-2173; App. 395-402) (Tr. 2181-2225; App. 403-430) (Tr. 4108-4114; App. 632 - 637)

Question 9 -- (Tr. 931-934; App. 237-239)

The questions (10) concerning the court's instructions to the jury were raised by specific written instructions profered and refused, and in two instances, by exception taken, before the jury retired to deliberate.

Question 10 -- (Tr. 2374-2375; App. 440-441; see also Cl. Tr. 151; 154) (Tr. 5089-5090; App. 675-676) (Tr. 5108; 5110; App. 684-685)

Misconduct of the prosecuting attorney during argument to the jury (question 11) was raised by a specific assignment, and requested admonition.

Question 11 -- (Tr. 4433-4435; 4442; 4444-4445; 4451-4455; App. 657 - 670)

Misconduct of the prosecuting attorney during examination of witnesses and calling of a witness for improper purpose (question 12) was not specifically objected to but reviewable in connection with previous question in determining the cumulative effect of prejudice.

Question 12 -- (Tr. 2629; App. 452) (Tr. 2856; App. 455) (Tr. 3011-12; App. 458-460) (Tr. 3215-3217; App. 472 - 474) (Tr. 3295; App. 489) (Tr. 3328-3330; App. 493-495) (Tr. 3803-3818; App. 607-614) (Tr. 4179-4183; App. 641-643)

SUMMARY OF PROCEEDINGS AND EVIDENCE

All proceedings were had in the United States District Court, Southern District of California, Southern Division at San Diego.

Proceedings Prior to Trial

1. Duke, Ballard and Buono were arraigned in the United States District Court, Southern District of California, Southern Division on June 3, 1955. (Tr. pp. 2A - 35A)
Duke entered a plea of not guilty to each count in the indictment and was granted leave by the court t file written motions attacking the validity of the indictment. (Tr. p. 25A, lines 4 - 10)

2. On June 7, 1955 Duke filed a written motion to dismiss the indictment, together with points and authorities. The grounds of the motion were: first, that the counts of the indictment failed to allege sufficient facts to constitute a cause of action; and second, that unlawful conduct relating to psittacine birds was proscribed by a specific law and therefore did not come within the provisions of the general smuggling statute. (Cl. tr. pp. 28-30) The motion was denied on June 23, 1955. (Tr. p. 68A) Trial was set for August 2, 1955. (Tr. p. 85A, lines 11 - 12)

3. All proceedings to this point were had before the Honorable Jacob Weinberger, United States District Judge. All subsequent proceedings including the trial were had before the Honorable Ernest A. Tolin, United States District Judge.

4. On July 25, 1955 the Honorable Ernest A. Tolin, at a hearing in open court, continued the trial date to August 3, 1955 (Tr. p. 145A, lines 11-1

5. At all stages of the proceedings to this poin Duke appeared in propria persona.
(Tr. pp. 3A, lines 22-23; 36A, 56A, 129A)

6. On August 3, 1955 prior to selection of the jury Duke appeared in the Judge's chambers accompanied by Clifford K. Fitzgerald, Attorney at Law. Duke announced that he desired to represent himself, and had brought Mr. Fitzgerald along to assist him in a limited capacity. Mr. Fitzgerald was not of record. The court stated that Duke could not represent himself and have assistance of counsel. The court further directed Duke to obtain counsel of record if he intended to testify and stated that he would not be permitted to testify and also argue the case to the jury. (Tr. p. 28)

After further discussion it was agreed that selection of the jury could proceed and the extent to which Duke would be permitted to participate would be determined after the jury was selected. Immediately thereafter court convened and selection of the jury commenced. Out of the hearing of the venire Duke moved for the association of Mr. Fitzgerald as his co-counsel. (Cl. Tr. 107)

The court again took the position that if Duke represented himself and also testified as a witness he could not argue the case to the jury. The court stated that for the reasons gone into in chambers, Mr. Fitzgerald could be associated with the understanding he was to conduct the case except for arguments on motions of law and the court would keep under submission until the following day whether Duke would be permitted to examine witnesses.

7. Upon completing the selection of the jury on August 3rd, they were sworn and excused until August 4, 1955. (Tr. p. 36)
(Tr. p. 36-A-2 to p. 36-A-3)

8. On August 4, 1955 prior to any proceedings in the presence of the jury, the court ruled that Duke would not be permitted to act in his own behalf in all proceedings, having moved the association of Mr. Fitzgerald. Duke excepted to the court's ruling and then requested that he at least be permitted to make an opening statement. Duke stated that he had fully intended to conduct his own case and that Mr. Fitzgerald had merely volunteered to assist in certain awkward situations; and that therefore, he, Duke, was the only one prepared to make his opening statement. The motion was denied. Whereupon, Duke moved the court for an order releasing Mr. Fitzgerald from the case. The motion was denied. (Tr. p. 40, line 23 - p. 45, line 20)

Proceedings at Trial

On August 4, 1955 the trial of Duke, Ballard and Buono commenced in the presence of the jury.

9. The Government's Case in Chief:

The prosecution's case in chief against Duke consisted of the testimony of six witnesses. They were either named as, or ruled by the court to be, unindicted co-conspirators in one or more of the conspiracy counts. They were: Robert Helm, John Hadzima, Nicholas Spicuzza, George Todd, Mary Ascani and Raymond Curtis.

The witness Robert Helm was convicted for smuggling aliens in February, 1953 and given a fine and five year prison sentence, both of which were suspended. He was placed on pro-

bation for five years. Duke was his attorney.
(Tr. p. 1288, 1291 - 1292)

The witness John Hadzima was convicted of smuggling birds in 1950. In October, 1953 Hadzima, together with the witness Nicholas Spicuzza and the witness George Todd, and others, was convicted for conspiracy and bird smuggling. Spicuzza and Todd were each sentenced to prison for three years. Hadzima was sentenced to five years and fined $5,000. Duke was the attorney for each of them in the 1953 trial.
(Tr. p. 374-75)

Hadzima, Spicuzza and Todd retained Duke to appeal their convictions and each was released on bail pending appeal.*(Tr. p. 1566)

Thereafter, in December, 1953 Spicuzza and Todd arranged with Helm and a Leonard Warwick to smuggle birds from Mexico, which act they did in January, 1954. It developed that Leonard Warwick was a customs agent. As a consequence, Todd and Spicuzza were arrested, indicted and convicted after a second trial in

---

* Note: The appeal, Steiner vs. United States, C.A. 9th, No. 14512, was decided by this Honorable Court on January 23, 1956. Conviction was affirmed as to Count I, conspiracy, and reversed as to all substantive counts.

June, 1954, their first trial in April, 1953, having resulted in a hung jury. Duke was their attorney. Helm appeared in both trials and testified as a Government witness. Spicuzza and Todd were sentenced to prison for four years on the second conviction and were brought from the Federal penitentiary to testify against Duke, Ballard and Buono.

(Tr. pp. 248-249; 1552-53; 1600-04)
(Cl. Tr. pp. 73 and 75)

In 1954 three successive and superceding Federal indictments were returned against Hadzima. Duke appeared in court for Hadzima on several arraignments and motions involving these indictments, the last appearance being in Federal court in Los Angeles, March 22, 1955. Hadzima was never tried. After March 22, 1955 Hadzima substituted another attorney, Harold P. Lasher, in the place of Duke. These indictments were pending against Hadzima at the time he testified against Duke, Ballard and Buono in 1955.

(Tr. p. 877-888)

Mary Ascani testified as a witness for the Government in the case of U. S. vs. Steiner, et al., in 1953 at which time she had been held to answer and was awaiting trial in the Los Angeles County Superior Court for the crimes of burglary and grand theft, to which charges she had entered a plea of not guilty by reason of insanity.

(Tr. pp. 1796; 1799-1800)

According to Helm and Ascani, they had related to Customs officials as far back as

1953 some of the facts about which they testified in the present trial; and although they were named as unindicted co-conspirators in the Duke, Ballard and Buono indictment, neither had been charged with any Federal offense involving psittacine birds at the time they testified in 1955. (Tr. pp. 1132; 1801-02)

After Helm testified as a witness for the Government against Spicuzza and Todd in 1954 he was released from probation at the request of the Federal probation officer, concurred in by the Assistant United States Attorney in San Diego. (Tr. p. 1299)

Raymond Curtis was convicted of a Federal offense involving psittacine birds in September, 1953 and was on probation for that offense at the time he testified. (Tr. p. 604-606)

A seventh witness, Thomas E. Johnson, gave no testimony in any way concerning Duke or Buono.

Note: We do not believe it necessary to restate the testimony of the witnesses in detail. If the testimony of Spicuzza, Todd, Hadzima, Helm and Ascani is accepted as true, and if their testimony need not be corroborated, then Duke concedes there is sufficient evidence to justify an inference of guilt, having in mind the rule that this Court, on appeal, will not review conflicting evidence and will not draw inferences contrary to the jury's findings despite the fact that as a trier of fact this Honorable Court might have reached a different conclusion.

However, if the witnesses produced by the prosecution were of such character that the

jury would have been justified in rejecting their testimony in toto, then we believe that assignments of error, if there be any, assume more significance on appeal. Therefore, the matters outlined above concerning the prosecution witnesses are related solely for the purpose of demonstrating that but for the errors of law assigned herein, the jury might reasonably have rejected their testimony and reached a different conclusion.

Summary of the Evidence Pertaining to Counts I, II and III.

The first count of the indictment charged a conspiracy and named Duke as the sole defendant. The period of the conspiracy was alleged to be from January, 1953 to April, 1953. Counts II and III likewise charge Duke as the sole defendant and are substantive offenses concerning the actual smuggling and transportation of psittacine birds on April 1, 1953, which offenses were stated to be the object of the conspiracy charged in Count I. The witnesses giving testimony concerning these counts were Nicholas Spicuzza, George Todd, John Hadzima and Robert Helm, all named as unindicted co-conspirators in Count I.

In substance, the testimony of Spicuzza, Todd and Hadzima was to the effect that since early 1950 they, and others, had been working together in the smuggling of psittacine birds into the United States. That Hadzima had been arrested for bird smuggling in 1949 and again in 1950, and that upon a plea of guilty he was sentenced to thirty days in jail. (Tr. p. 700-704)

That Buono was and had been since 1949 a bail bondsman in San Diego and that as such became acquainted with Hadzima in 1949, and with Spicuzza and Todd in the Spring of 1952. (Tr. p. 701 - 702)

That from October, 1952 through the latter part of 1953 Duke was retained to represent the Continental Casualty Company bail bond division with respect to litigation in the San Diego County courts involving the interpretation by the State authorities of the Federal Soldiers and Sailors Relief Act. Buono was one of the two agents in San Diego representing the Continental Casualty Company. (Tr. p. 2306-2307)

That Robert Helm was an aviator and was in no way involved with Spicuzza, Hadzima and Todd, or bird smuggling, until February, 1953.

That in the latter part of October, 1952, Helm was arrested and charged with smuggling aliens. That Buono posted a bail bond for Helm on this charge. Buono employed Duke at this time to prepare a property pledge for Helm to sign as security to the bonding company. As a consequence Helm retained Duke to represent him on the alien smuggling charge. (Tr. pp. 2307-2308) Helm's trial was eventually set for January 12, 1953.

In the meantime, in November, 1952 a Chester Vosburg was arrested for smuggling psittacine birds. Buono posted bond for Vosburg. On the day Vosburg was released from jail on bond Duke was in Buono's office in connection with the civil litigation in which Duke was representing the bonding company and was introduced to Vosburg. As a

result Duke was retained to represent Vosburg on bird smuggling charges. The matter was set for trial for January 23, 1953 in the San Diego Federal Court the same day as the Helm case had been set. At the time Vosburg was arrested he was working for Spicuzza, Todd and Hadzima.

Both Helm and Vosburg appeared in the same courtroom on January 12, 1953. The Vosburg case was tried first and the Helm case continued. (Tr. pp. 2339 - 2346) On January 14th Vosburg was acquitted by jury. (Tr. p. 62) On February 12th Helm was convicted on the alien smuggling charge by the court sitting without a jury. On February 27th Helm was given a five year sentence and fined. Both the fine and prison sentence were suspended and Helm was placed on probation for five years. (Tr. p. 2348)

Sometime after Vosburg was acquitted Spicuzza, Todd and Hadzima testified that they came to Duke's office to arrange payment of Vosburg's attorney's fees and at that time sought to retain Duke in the event they got into any trouble. Although they had known Buono for some time and he was apprised of their bird smuggling activities early in 1952, this was the first time any of them had met Duke. Hadzima places the date of this conference sometime about February 22, 1953 or after (Tr.p.902 963) while Todd and Spicuzza place the date as being sometime in January following Vosburg's acquittal.

Hadzima, Spicuzza and Todd testified in substance that at this first conference in Duke's office Duke suggested that they start smuggling birds by airplane. That he, Duke, would introduce them to a pilot, (Helm) for that purpose. (Tr. p. 707, et seq)

Hadzima, Spicuzza and Todd testified that they saw Duke in his office a few times thereafter and on one such occasion Duke introduced them to Helm. That Hadzima, Todd, Spicuzza and Helm discussed terms concerning Helm flying birds into the United States for them. Thereafter, according to Helm, Spicuzza and Todd a load of birds was flown into the United States by Helm and landed at Apple Valley, California where they were taken by Spicuzza and Todd. This transaction forms the basis for Counts II and III.

Helm testified that his first information concerning bird smuggling came from Duke on February 12, 1953 immediately after he was granted probation. Helm said that Duke advised him that he should start smuggling birds instead of aliens and that Duke then told him about Vosburg. Helm said at this time (February 12th) Duke told him he was going to get an acquittal on the Vosburg case. (Tr. p. 1033) Helm said he had not heard of Vosburg prior to this time and that he did not recall being in court with Vosburg on the day his (Helm's) case was continued and the Vosburg case went to trial.

Helm said that on Duke's advice he met with Spicuzza, Todd and Hadzima in Duke's office. That thereafter, on April 1, 1953, in accordance with arrangements, flew a load of psittacine birds from Mexico to Apple Valley, California and delivered them to Spicuzza or Todd.

Helm said he stayed at the Apple Valley Inn that night, and that he called Duke in San Diego by long distance telephone from the Apple Valley Inn. (Tr. p. 1050-1052) Helm produced a receipt from the Apple Valley Inn which contained a notati

showing a charge of $1.51 for a phone call. Helm said this receipt represented the call that he had made to Duke. (Tr. p. 1416)

(Note: Records of Apple Valley Inn show this call was made to a woman in Los Angeles and not Duke. Tr. p. 2589 - 2603)

Counts IV, V and VI

Count IV charges a second conspiracy beginning in April, 1953 and continuing to December, 1954. Duke, Ballard and Buono are charged as defendants. Robert Helm, Hadzima, his wife, Mary Ascani and a Roy Pursselley were named as unindicted co-conspirators. The latest date of any overt act charged was June, 1953.

Counts V and VI charge that on May 13, 1953 Duke, Ballard and Buono smuggled, received and transported thirty crates of psittacine birds. Said counts are the substantive offenses alleged to be the object of the conspiracy charged in Count IV.

The witnesses giving evidence as to these counts were Hadzima, Helm, Ascani, Spicuzza, Todd and Raymond Curtis, key witnesses being Hadzima and Helm. (Tr. pp. 1053-1091, 800 - 841)

Although there were conflicting versions of the various occurrences in resolving the conflicts most evidence in substance was that while the conspiracy alleged in Count I was in progress, Hadzin Ballard, Helm, Duke Buono and Roy Pursselley entered into a separate conspiratorial agreement, the object of which was to steal birds from Spicuz: and Todd.

According to Hadzima and Helm a number of discussions in this respect were had in Buono's office in the presence of both Duke and Buono. In the latter part of April or the first part of May, 1953 Spicuzza, Todd and Raymond Curtis arranged for Helm to fly a load of birds into the United State;

After much discussion as to where these birds were to be landed Helm suggested an abandoned air strip near Desert Center, Riverside County, California. Spicuzza and Curtis agreed. A pilot named Joe Navarro who had flown birds from Mexico City to points near the border for Spicuzza Todd and Hadzima during 1951 and 1952 was to fly the birds from Mexico City to a point in Lower California where they were to be picked up by Helm and flown to Desert Center.

According to one version given by Helm, he met with Hadzima, Ballard, Duke, Buono and Pursselle in San Diego on May 11, 1953 in Buono's office. At that time it was agreed that Helm would fly the birds into Desert Center on the evening of May 13, 1953 and that Hadzima, Ballard and Pursselley would be on hand to take the birds from Spicuzza and Curtis.

Helm, pursuant to his separate agreements, one with Spicuzza, Todd and Curtis, and the other with Hadzima, Ballard, Pursselley, Duke and Buono, piloted his plane carrying a load of birds to Desert Center on the evening of May 13, 1953. Spicuzza and Curtis were at the airport to receive the birds. Helm landed, unloaded and stalled for time until Hadzima, Ballard and Pursselley arrived. Ballard bound Curtis and Spicuzza; Helm flew his plane away; and Pursselley and Hadzima took the birds to the Burbank, California aviary of Mary Ascani,

who, according to previous arrangements, was waiting to receive them.

Thereafter, Mary Ascani sold the birds, the proceeds being delivered to Pursselley, Helm Ballard and Hadzima. Helm testified that he came to San Diego in the latter part of May with Pursselley and that Pursselley told him he was going to deliver to Buono and Duke $1500. each as their share. Pursselley was not called as a witness, however. The balance of the proceeds was divided among Ballard, Hadzima, Helm and Pursselley. (Tr. p. 800-841, 1053, 1099)

Helm and Ascani attempted to bolster their testimony with respect to telephone conversations they claimed they had with Duke concerning the events in these counts by producing two documents Helm said he called Duke long distance on April 29 1953 at a "confidential number" which he said Duke had previously given him. Helm produced a business card with the so-called "confidential number" penciled in the corner stating this was the number he called. Duke's phone records revealed that the number belonged to an employer association, was not "confidential" and not even in existence on April 29, 1953, but was installed on May 18th of that year. (Tr. pp. 1062-64 - Govts. Ex. 4)

Mary Ascani said she called Duke's office on May 24, 1953, but that Duke was in court and returned her call later that day. She produced a telephone bill showing a call to San Diego dated May 24th saying this was the call she made to Duke. A 1953 calendar put in evidence showed that May 24th was on Sunday. (Tr. 1776-78;1808-10)

This transaction forms the basis for Counts V and VI; and according to the overt acts alleged

is the object of the conspiracy charged in Count IV.

Counts VII, VIII, IX and X

Count VII charges another conspiracy beginning in June, 1953 and continuing until October, 1953. Duke and Buono are named as defendants, and Spicuzza, Todd, Helm and an Albert Appel were named as unindicted co-conspirators. Counts VIII, IX and X charge that Duke and Buono smuggled birds into the United States on June 25, 1953; on August 28, 1953 and on September 28, 1953. These counts are substantive offenses and are the object of the conspiracy alleged in Count VII.

The witnesses who testified with reference to these counts were Spicuzza, Todd and Helm. Resolving the conflicting versions most favorable to the prosecution, the substance of the evidence was that in June, 1953 Duke and Buono met with Spicuzza, Todd and Helm in Buono's office, and that Buono obtained a loan of $2500. from Albert Appel which he delivered to Helm to be used as a down payment on an airplane which Helm was to purchase for the purpose of smuggling birds with Spicuzza and Todd. (Tr. 218-225)

According to Spicuzza, Buono and Duke advised them to go back into the bird smuggling business and assured them there would be no more hijacking. Helm, Spicuzza and Todd formed a partnership and agreed that profits would be divided equally among the three. Helm bought an airplane and according to the testimony transported birds from Mexico to the United States with Spicuzza and Todd on June 25th, July 17th, August 28th and September 28, 1953. Spicuzza repaid

Buono the $2500. loan out of proceeds from the sale of these birds. (Tr. 222; 224-251)

According to Spicuzza, in the summer of 1953 Buono loaned him various sums of money which were used by Spicuzza, Todd and Helm in connection with the smuggling activities. (Tr. 225-248) After June, 1953 all birds smuggled by Helm, Spicuzza and Todd were first landed at Las Vegas and delivered to the home of a person named Robert Crapella where they were unloaded and stored. (Tr. p. 1597-1600) Helm said he had introduced Spicuzza to Crapella and that he and Spicuzza had been to Crapella's house several times with their birds. (Tr. p. 1342)

Note: Helm testified in this same court as a witness for the Government in 1954 that he had never been to Crapella's house with Spicuzza and that he had never see any birds at Crapella's house. When confronted with the transcript of his previous testimony Helm admitted he had so testified and by way of explanation said that he evidently did not tell the truth. (Tr. 2620-29; App. 441-52)

Both Todd and Spicuzza testified that neither Duke nor Buono at any time asked for or received any share of the profits derived from their alleged smuggling operations. (Tr. pp. 243; 1546-47)

During this period while Duke was supposed to be involved in a conspiracy with Helm, Buono, Spicuzza and Todd, Hadzima testified over objection by Mr. Whelan that he, Duke and Ballard were involved in a separate conspiracy. Hadzima said that from July, 1953 to December, 1954 he smuggled some 40 or 50 loads of birds into the

United States. This venture earned him approximately $150,000. Hadzima said he and Ballard each took 45% of this sum and gave Duke 10% in exchange for advice. (Tr. pp. 842-860)

10. The Government rested its case on August 19, 1955. (Tr. p. 1875, line 3)

11. On August 20, 1955, and before producing any evidence, Duke made the following motions:

(a) Motion for judgment of acquittal. (Tr. p. 1879)

(b) Motion to strike overt acts numbers three and six from Count I of the indictment. (Tr. p. 1918 - 1919)

All motions were denied. (Tr. p. 1930, line 20

12. Case of the Defense:

In view of the fact that the jury resolved the conflicting evidence against the defendants, and in favor of the prosecution, we will not detail the evidence produced on defense.

Duke and Buono testified at length; denied generally and specifically that they had been a party to any of the unlawful conduct alleged in the indictment and testified to by the witnesses.

In general, Duke testified that his relationship with the witnesses Spicuzza, Todd, Hadzima and Helm was confined to representing them as an attorney. He denied that he introduced Helm to Spicuzza, Todd or Hadzima; and denied that he ever suggested to Helm that he participate in

any smuggling enterprise. He testified that he never met with Helm and either Spicuzza, Todd or Hadzima in his own office or in Buono's office. Buono likewise testified that no such meetings took place. (Tr. pp. 2303, et. seq; 3014, et. seq.)

Insofar as Duke is concerned the rest of the evidence produced on defense was directed to matters bearing on the motive, bias and general credibility of the prosecution witnesses, and by way of impeachment of their testimony.

Some of the evidence offered by Duke was received and some rejected. As to evidence rejected, detailed offers of proof were made. These questions will be discussed in the argument.

One item of evidence admitted for the limited purpose of impeaching Hadzima which created considerable controversy was a recording of a telephone conversation between Duke, Buono and the witness Hadzima, wherein Hadzima confessed to being a participant in a somewhat fantastic plot to frame Duke. (D's. Ex. R & S) The principle controversy concerned the purposes for which the jury was authorized to consider statements on the recording. (Tr. 2048-96; App. 367-389)

Considerable confusion developed as a result of what could have been a general misunderstanding with respect to what Duke was going to prove in his defense. Right or wrong, it appears that the prosecution and court entertained the believe that Duke at the outset of the case had announced that he was going to prove that an independent conspiracy was in operation among a number of persons, the object of which was to frame and convict Duke on false charges.

Right or wrong, it appears that Duke did have the impression that insofar as the present trial was concerned the suggestion came from the prosecution or the bench; and right or wrong, it appears that Duke did believe that the court and the prosecution had called upon him in the presence of the jury to prove this independent conspiracy to frame him.

The result was that Duke undertook to offer evidence on this issue. After considerable confusion which involved Duke, his associate counsel Mr. Fitzgerald and the counsel for the other defendants, the proof offered was rejected. This matter will be discussed further in argument inasmuch as Duke claims that he was substantially prejudiced in the presence of the jury.

The rebuttal of the prosecution, insofar as Duke is concerned, consisted of evidence offered to rehabilitate the witnesses Helm and Hadzima, and by way of impeachment of the testimony of Duke and Buono.

13. On September 13, 1955 the taking of evidence was completed and all parties rested. (Tr. p. 4208) Duke made a motion, which was taken under advisement, for a judgment of acquittal on all counts. (Tr. p. 4307)

14. On September 23, 1955, the jury returned verdicts finding Duke guilty on all counts; Ballard guilty, counts 4 to 6 as charged; Buono not guilty counts 4 to 6, and guilty counts 7 to 10.

The Court denied the motion for judgment of acquittal and set the time for hearing on any

motions and for pronouncement of judgment for September 30, 1955 at 10:00 A. M. (Cl. Tr. 245-247

Proceedings Subsequent to Trial

15. On September 28, 1955 Duke filed a motion in arrest of judgment and a motion for a new trial. The motion for a new trial was stated to be on the grounds that Duke had been deprived of the right to be represented by counsel of his choice; and further that he was deprived in certain instances of any effective representation by counsel, in violation of the Fifth and Sixth Amendments to The Constitution of the United States. (Cl. Tr. p. 289)

16. On September 30, 1955 Mr. Barton C. Sheela, Jr. and Mr. George Williams Rutherford, attorneys at law, appeared and were granted leave by the court to associate as co-counsel on behalf of Duke for the hearing on the motion and pronouncement of judgment.

17. On September 30, 1955 Duke's motion in arrest of judgment and motion for new trial were denied. (Cl. Tr. p. 284-285)

18. On September 30, 1955 all motions were denied and the court pronounced judgment and sentence as follows:

(a) Duke - was sentenced to prison for five years on each of Counts I, IV and VII to run concurrently; two years on Counts II, III and V; two years on Counts VI and VIII; two years on Counts IX and X. Each of the two year sentences were ordered to run consecutively to the five year sentence, making a total term of eleven years. (Cl. Tr. p. 296)

(b) Ballard - was sentenced to prison for a term of nine years. (Cl. Tr. p. 296)

(c) Buono - was fined in the total sum of $5,000.00 and placed on probation.

This appeal followed.

SPECIFICATION OF ERRORS

FIRST
(Re: Questions 1, 2, 3)

The court denied Duke the right to proceed to trial as his own counsel and in some instances deprived Duke of any effective representation by counsel, all in violation of Articles Five and Six of the Amendments to The Constitution of the United States, and by reason thereof the judgment of conviction is void. If the matter was discretionary the court abused its discretion;

1. on August 3, 1955 prior to trial in ruling that Duke could not testify and also argue the case if he elected to represent himself;

2. in ruling that Duke could not appear in propria persona and have the assistance of an associate counsel;

3. on August 4th prior to any proceedings in the presence of the jury in refusing Duke's request to be permitted to outline his case to the jury by way of an opening statement; and

4. prior to commencement of trial in the presence of the jury in denying Duke's motion to release his associate counsel and represent himself;

and as a result of the court's rulings Duke was substantially prejudiced and deprived of a fair trial, and it was error for the court to deny Duke's motion for a new trial.
(Tr. 28-45; 96; 3357-3360; 3391;3896-3903; Cl. Tr. 110; 289)

SECOND
(Question 6)

It is proper to cross-examine a witness concerning his prior acts and declarations bearing on his bias, prejudice and motive in testifying; and the court erred, first, in directing Duke to not cross-examine Hadzima with respect to such matters but to offer such proof affirmatively in his own case; and second, in refusing to admit evidence of Hadzima's prior acts and declarations when offered to prove his bias, corrupt motive and interest in the case.
(Tr. 956-57; App. 242-43. Tr. 2657-59; App. 452-54. Tr. 3361; App. 504-5. Tr. 3366-67; App. 508. Tr. 3372-73; App. 512. Tr. 3378-88; App. 515-520. Tr. 3391-92; App. 522. Tr. 3398-3448; App. 525-548. Tr. 3517-31; App. 553-558. Tr. 3581-85; App. 565-570. Tr. 4280-91; 4296-98; App. 649-652)

THIRD
(Question 7)

The court erred in refusing to admit the testimony of Duke's former law associate to the effect that during a specific period Duke was heavily in debt and had to borrow funds from the bank to meet current expenses, to rebut the testimony of the witness Hadzima that during the same period he had delivered to Duke fabulous sums of money which Duke had denied. (Tr. 3294-3297)

FOURTH
(Question 8)

The court erred in refusing to admit evidence that just prior to the trial the witness Robert Helm was engaged in illegal conduct in violation

of United States laws and had not been prosecuted therefor.

(Tr. 2166-73; App. 395-402. Tr. 2181-2225; App. 403-430. Tr. 4108-14; App. 632-37)

FIFTH
(Question 9)

It was error constituting an undue abridgment of the right of cross-examination to permit counsel for the witness Hadzima to appear in court and stand beside him while Hadzima was being cross-examined by Duke and advise Hadzima privately before answering questions which were within the scope of the direct examination.

(Tr. 931-34; App. 237-39. Tr. 896-97; App. 231-32. Tr. 466-68; App. 179-81)

SIXTH
(Question 10)

The court erred in instructing the jury in:

(a) refusing to give requested interim instruction to the effect that if stronger evidence were available to prove a fact, failure of the Government to produce such evidence would create an inference that such evidence would be unfavorable to them;
(Tr. 5110; App. 684-85; Cl. Tr. 244)

(b) commenting that strong suggestion had been made by some counsel that some of the Government witnesses had conspired together and that the jury should consider such accusation and consider to what extent the witnesses in the penitentiary had access to one another.
(Tr. 5089-5090; App. 675-76. Tr. 5108; 5110; App. 684-85)

(c) Refusing to instruct the jury that in the circumstances of this case a conviction may not be had solely on the testimony of accomplices unless such testimony be corroborated by other evidence.
(Tr. 2374-75; App. 440-41. Tr. 5089-90; App. 675-76. Cl. Tr. 151)

SEVENTH
(Question 12)

The prosecutor committed misconduct in the presence of the jury by:

(a) calling the witness Sankary to the stand not to elicit any material evidence but solely for the purpose of informing the jury that Duke had subpoenaed Sankary and failed to call him as a witness.
(Tr. 3803-09; 3814-18; App. 607-14)

(b) asking Duke on cross-examination degrading and derogatory questions which assumed a state of facts not in evidence and which questions were asked in bad faith because no evidence was offered concerning the matter.
(Tr. 2856; App. 454-55. Tr. 4181-83; App. 641-43)

EIGHTH
(Question 11)

The prosecutor committed misconduct during his opening argument to the jury by:

(a) making inflammatory remarks upon a subject which had been excluded from evidence;

(b) making inflammatory and prejudicial factual statements concerning Duke which were not only outside the evidence but which the prosecutor knew were not true;

(c) making statements amounting to an expression of his personal opinion that Duke was guilty.

In the circumstances of this case the cumulative acts of misconduct substantially prejudiced Duke and deprived him of a fair trial.
(Tr. 4433-4435; 4442-4445; 4451-4455; App. 657-670)

NINTH
(Question 4)

The court erred in assessing consecutive felony punishments because the offense or offenses charg were only misdemeanors by reason of specific law
(Cl. Tr. 28 and 68)

TENTH
(Question 5)

The court erred in pronouncing judgment and assessing consecutive punishment on counts II, III and V, and on counts VI and VIII, and on counts IX and X because none of said counts allege facts sufficient to state any offense against the laws of the United States.
(Cl. Tr. 28, 68 and 204)

ARGUMENT

Summary of Argument

In May, 1955 two separate indictments were returned at the same time against Duke, both concerning 1953 events.

This appeal is based on the first indictment, number 25,276. In the second indictment, number 25,277, Duke was the sole defendant and charged with obstruction of justice and conspiracy with respect to conduct alleged to have occurred in connection with the 1953 bird smuggling trial. Hadzima and Helm are named as two of the unindicted co-conspirators. The second indictment is still pending.

Note: The appellee especially designated for inclusion in the record the proceedings with reference to this second indictment.

Duke was arraigned on both indictments at the same time, June 3, 1955. The record of the various proceedings prior to trial indicates that Duke apparently felt that it would be to his advantage if the case wherein he was the single defendant was tried first. Mr. Steward, the prosecutor, apparently felt that the Government would gain some advantage if the trial involving the three defendants preceded Duke's individual trial. This controversy created considerable acrimony between Steward and Duke, and during the several proceedings prior to trial Duke made an exhaustive attempt to obtain an early trial in the matter in which he was a single defendant. (Tr. 2A-55A)

On June 23, 1955 the court ordered that the two

indictments would be tried separately and stated that August 2nd was the first available trial date. Upon Duke and Steward reiterating their respective positions as to the order in which the two indictments should be tried, the court resolved the conflict by setting the trial of both cases for August 2, 1955, stating that the judge who tried the cases could decide which should be tried first. (Tr. pp. 68A-71A; 81A-92A; 126A-128A; App. 59-69)

On July 25th the Honorable Ernest A. Tolin who presided at the trial settled the matter by ruling that the case of the three defendants would be tried first and that Duke's individual case would trail.
(Tr. pp. 132A-145A; App. 83c - 83 l)

Although twelve questions and ten errors are specified in this brief many of the questions and errors assigned are related and involve a single course of conduct. We are mindful of the provisions of Rule 52, Rules of Criminal Procedure (U. S. C. Rules C. 2) and readily concede that some of the assigned errors standing alone would not justify reversal.

In accordance with the rules of this Honorable Court the claimed errors have been separately stated; however, in argument errors pertaining to the same general subject matter will be presented together and their cumulative effect argued.

That no questions concerning the sufficiency of the evidence are urged is not to be construed as a concession that there is any truth in the testimony given by the prosecution witnesses.

A careful scrutiny of the record demonstrates that Duke was convicted on evidence that was completely unrealistic and in many particulars proven false. This evidence came from witnesses whose credibility had been assailed by Federal prosecutors, and whose testimony had been rejected by Federal judges and juries from 1949 to 1955.

In 1955 these witnesses, under oath, confessed to various criminal activities, in some instances dating back to 1949, including theft, robbery, smuggling and perjury.

In the course of his regular profession in 1953, 1954 and 1955 Duke, as an attorney, defended most of these witnesses. Then for the first time in 1955 these witnesses enlarged upon, and in some instances recanted, their previous statements and testimony and said that Duke, their lawyer, and Buono, their bondsman, had aided, abetted, counseled and advised them in their criminal activities in 1953. Although the verdicts are somewhat inconsistent, the law presumes that the jury believed this testimony.

As an appealing defendant Duke knows the verdict was erroneous, but as a lawyer he knows that the decision of the jury on conflicting facts is never subject to review. This rule, however, presupposes that all parties to the controversy are afforded a fair opportunity to present their respective contentions to the jury, in accordance with certain fundamental procedures which are designed insofar as human agency is possible, to make certain that the verdict reflects the truth.

In the first error specified Duke complains that

the court deprived him of counsel contrary to the Constitution. Duke was his own counsel and prepared to go to trial as such. A simple request made prior to any proceedings to be permitted to have the assistance of Attorney Clifford K. Fitzgerald as co-counsel resulted in depriving Duke of any effective counsel. As soon as the court made a final ruling that Duke could either act in propria persona or have counsel but not both Duke elected to proceed alone, and so moved. The court denied the motion, and Duke was thereby compelled to abandon the manner in which he had intended and prepared to conduct his defense. Thus, Duke, over strenuous objection, proceeded to trial unable to present his case and with a court-imposed counsel unprepared to do so. (Tr. 40-45; App. 130-34

As a result of the court's rulings it became necessary that Duke request Ballard's Attorney, Mr. Whelan, to make a brief general statement to the jury by way of opening on Duke's behalf. Mr. Whelan likewise was not prepared to outline Duke's position to the jury. At this point, Duke contends that he had been deprived of an absolute Constitutional right, and by reason thereof the subsequent proceedings were void.

If, however, this right was not absolute but discretionary with the court, Duke contends that an abuse occurred which resulted in many instances of prejudice, the accumulative effect of which deprived Duke of a fair trial.

The opening remarks made by Mr. Whelan on behalf of Duke were misinterpreted during the trial by the court, the prosecutors and apparently Mr. Fitzgerald. (Tr. 1955-56; App. 344-45)(Tr. 3207-11; 3214-17; App. 464-67; 470-73)

The result was that an issue collateral to these proceedings was interjected into the case, the effect of which permeated the entire trial, including argument to the jury, all to Duke's prejudice. This issue was characterized "Duke's special defense" which label gained prejudicial prominence during the trial in the presence of the jury. Although such characterization was a complete misnomer efforts by the defense to establish facts relevant to the bias, motives and prejudice of the witnesses was branded by the prosecutors as "Duke's special defense". (Tr. pp. 3215-17; App. 470-73)

After Fitzgerald had contributed to interjecting this collateral issue into the case by responding affirmatively to a question posed by the court in the presence of the jury, he later in open court (outside the presence of the jury) renounced both Duke and his so-called "special defense". (Tr. p. 3358-59; App. p. 503) That afternoon the newspaper headlines glared - "OWN ATTORNEY SPURNS DUKE DEFENSE CLAIM". (Court's Exhibit 1) Considerable disagreement, and in some instances acrimony, developed between Duke and Fitzgerald, which development the court expressly recognized. (Tr. pp. 3896-3903; App. 621-628)

The second, third, a portion of the sixth, the seventh and the eighth errors specified all concern matters closely related to this collateral issue and probably occurred as a result of it being interjected into the case. Therefore, these errors will be presented and argued in connection with demonstrating

the prejudice that resulted to Duke stemming from the rulings of the court on August 3rd and 4th, which rulings prevented a concise clarification of the issues by Duke at the outset.

In the fifth error specified Duke complains that his right to cross-examination of a principal Government witness, John Hadzima, was unduly abridged; and the third error specified relates to refusal of the court to permit evidence to rebut testimony given by John Hadzima against Duke during this cross-examination. These two errors will be argued in conjunction.

(Tr. 931-34; App. 237-39. Tr. 896-97; App. 231-32. Tr. 466-68; App. 179-81)

(Tr. p. 3294-97; App. 488-490)

In parts of the seventh error Duke complains of the court's refusal to give certain requested instructions. Duke requested that the court instruct the jury that a conviction could not be had on the testimony of the accomplices unless corroborated by other evidence. Mindful that the giving of such an instruction is contrary to the rule as heretofore announced in this circuit, the issue is nonetheless briefly raised for reconsideration in view of the character of the witnesses in this case upon whose testimony Duke was convicted.

The remaining errors specified involved rulings of the court concerning the legal sufficiency of the various counts in the indictment and the sentence imposed thereon.

The authorities in support of the various propositions follow.

I

THE COURT DENIED DUKE THE RIGHT TO PROCEED TO TRIAL AS HIS OWN COUNSEL AND IN SOME INSTANCES DEPRIVED DUKE OF ANY EFFECTIVE REPRESENTATION BY COUNSEL, ALL IN VIOLATION OF ARTICLES FIVE AND SIX OF THE AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND BY REASON THEREOF THE JUDGMENT OF CONVICTION IS VOID.

A. By reason of Article V and Article VI of the Amendments to the United States Constitution and the decisions of the courts thereunder an accused in a Federal criminal case has an absolute right to effective assistance of counsel which includes the right to act as one's own counsel.

The decisions of the Supreme Court of the United States and the Courts of Appeals for the various circuits uniformly hold that non-compliance with the constitutional requirement of assistance of counsel of one charged with crime deprives the court of jurisdiction to proceed.

Johnson v. Zerbst, 304 U.S. 458

Glasser vs. U. S., 315 U.S. 60

Kuczynski v. U. S., 149 F. 2d. 478 (C.A. 7, 1945)

Likewise, the accused has the absolute right to act as his own counsel.

Adams v. U. S., 317 U.S. 269

U. S. v. Bergamo, 154 F. 2d 31
(C.A. 3, 1946)

28 U.S.C. 1654

The provisions of the Constitution and Statutes and the substantive rules established by the court decisions concerning the right to counsel all embody the fundamental concept that an accused must be afforded a fair opportunity to defend against the charge. As stated by the Supreme Court in Adams v. U. S., 317 U.S. 269, at page 279:

> "The right to assistance of counsel and the correlative right to dispense with a lawyer's help are not legal formalisms. They rest on considerations that go to the substance of an accused's position before the law. . . An accused must have the means of presenting his best defense. . . But evidence and truth are of no avail unless they can be adequately presented. Essential fairness is lacking if an accused cannot put his case effectively before the Court. But the Constitution does not force a lawyer upon a defendant. He may waive his constitutional right of assistance of counsel if he knows what he is doing and his choice is made with eyes open. "

Characterization of constitutional rights as being either "absolute" or "discretionary" is not precisely correct. The "right" itself is absolute and exists by reason of its express inclusion in the Constitution. The manner in which the "right" is exercised is subject to regulation and control in the sound discretion of the court, provided full exercise of the right is accorded. Thus, the "right" is absolute, the exercise

of which can neither be denied or impaired, but the regulation of the manner of its exercise is discretionary.

Thus, the court obviously has discretion in regulating the conduct of counsel during the trial. Likewise, an accused who is afforded competent counsel of his choice cannot during the trial under, the guise of pretending to exercise a constitutional right, relieve his counsel for purpose of gaining a delay or for any other improper purpose. In such case the accused is not attempting to exercise a right given by the Constitution, and the court certainly has authority and discretion to control such abortive conduct.

U. S. v. Foster, 9 F. R. D. 367

B. By Reason of the rulings of the trial court prior to the commencement of any proceedings in the presence of the jury Duke was denied the right to proceed as his own counsel and by reason thereof this judgment is void.

Duke was an attorney and at the time of trial and prior thereto was admitted to practice before the Federal court in which his trial was had. Duke had appeared as his own counsel at all stages of the proceedings prior to trial. (Tr. pp. 3A; 36-A; 56-A; 129-A; App. pp. 3, 19, 31, 44, 83a)

On July 25, 1955 a hearing was had before The Honorable Earnest A. Tolin, Trial Judge, concernin pre-trial matters. At that time Duke announced that he was appearing in propria persona and no ques tion was raised with respect thereto.
(Tr. p. 132-A; App. p. 83c)

On the morning of August 3rd the trial judge held a chambers conference prior to the commencement of the selection of the jury. Duke appeared and brought with him an attorney named Clifford Fitzgerald who had offered to counsel with Duke and to assist him in areas of the trial where it would be awkward to be both counsel and accused. Toward the end of the conference Duke was taken by surprise when the court advised him that he must not address the court except through his counsel, Mr. Fitzgerald. Duke immediately informed the court that he was representing himself and only associating Mr. Fitzgerald. The court said "you can't do that". When Duke stated that Mr. Fitzgerald was not even of record in the case the court advised Duke that he had better get "a lawyer of record", because if he intended to testify as a witness there were rules which would prevent him from arguing the case to the jury.
(Tr. p. 28, lines 6-24; App. p. 106)

Duke was in a dilemma. Selection of the jury was about to commence and Duke had to elect either to defend himself and forfeit his right to testify, or proceed to trial with a lawyer totally unprepared and unable to effectively represent him. During the remaining minutes of the pre-trial chambers conference Duke attempted to explain his predicament and explored the extent, if any, to which the trial judge would permit him to participate if Mr. Fitzgerald remained in the case. The court agreed Duke could argue questions of law out of the presence of the jury. Duke inquired about examination of witnesses, and the court expressed disapproval but indicated the matter would have to be settled on principles of law. The court

reserved ruling until the following day. (Tr. pp. 36-A-2, 36-A-3) Duke contends that the initial error occurred in the proceedings just related.

The court conceded that under the law Duke did have the right to elect to represent himself but imposed an unconstitutional condition on the exercise of the right.

In Thomas vs. District of Columbia, 67 App DC 179, 90 F. 2d. 424, the court held that the provisions of the Constitution guaranteeing the accused in a criminal case the assistance of counsel for his defense, means effective assistance, and where the right of counsel to argue the case is denied, effective assistance is thereby forbidden.

In view of the statement in chambers that no proceedings would be had that day except selection of the jury, the court having indicated that further authorities would be examined in order to ascertain to what extent the law permitted Duke to participate and also have assistance of counsel, Mr. Fitzgerald was associated as co-counsel of record with Duke. (Tr. p. 36-A-2, 36-A-3) The jury was selected, sworn and excused until August 4, 1955. (Tr. p. 36)

On the afternoon of August 3rd following adjournment another conference was held in the judge's chambers concerning the matter of defense counsel being permitted to interview two Government witnesses in Federal custody. The prosecutor had agreed to the interview and prepared an order which excluded Duke. When Duke objected to the order as prepared and reiterated his position that he intended to represent himself

Mr. Steward took the position that they would assert their legal right to refuse to permit the witnesses to be interviewed if Duke participated. (Tr. pp. 36-A-160-63; App. 119)

The question of Duke's participation in the trial was then argued extensively and it became apparent that Mr. Steward vigorously opposed Duke being permitted to conduct his own case. Duke emphasized that he was prepared and Fitzgerald was not and that although he had fully intended to defend himself, because of statements made in the morning conference he decided that he would leave final argument to the jury to Mr. Fitzgerald, but stated that he felt at the outset he must participate in the case. The court indicated that he would permit Duke to examine witnesses. However, the court sustained Mr. Steward's refusal to permit the witnesses to be interviewed if Duke were present. (Tr. 36-A-164, 36-A-171, App. 128)

To this point Duke had made every concession possible to avoid creating any breach with the trial judge and at the same time preserve to himself a fair opportunity to properly defend himself.

It was apparent that in view of the attitude of the prosecutors and the feeling of the trial judge in the matter, the presence of Mr. Fitzgerald in any capacity was going to make the defense of the case exceedingly difficult. Even though Duke forfeited certain privileges by proceeding alone, there were certain fundamental rights that could not be denied him, which rights, i.e., opportunity to outline case to jury, cross-examination, etc., he could

well lose by Mr. Fitzgerald's presence in the case unprepared to effectively exercise them.

On the morning of August 4th prior to any proceedings in the presence of the jury the trial judge announced that he had reviewed cases since the previous day bearing on the right of Duke to participate in his own defense. The judge said that constitutional and statutory rights were for an alternate procedure and that Duke had to either appear in pro per or be represented by counsel; that any variation from that was in the discretion of the court and not a matter of right. (Tr. pp. 40-41; App. 130)

The court said Fitzgerald must make all arguments of fact and the opening statement to the jury, and that Duke's participation would be limited to that of a defendant except that he would be permitted to examine witnesses, which privilege would be revoked if any improprieties occurred. (Tr. pp. 40-41; App. 130)

Duke specifically excepted to the court's ruling and requested leave to be permitted to mak an opening statement, stating that he alone was prepared. The court denied the motion. (Tr. pp. 42-43; App. 131-32) Duke inquired if the court would permit him to proceed in pro per if Mr. Fitzgerald withdrew and the trial judge indicated that he would not permit Fitzgerald to withdraw because during the day before Duke had moved that Fitzgerald be made his attorney. (Tr. pp. 43-44; App. 132-33)

Duke explained that he only moved that Mr. Fitzgerald be associated as co-counsel, and again reiterated the limited purpose for which

Mr. Fitzgerald had voluntarily been associated and that he had previously made it plain that he intended to represent himself. The trial judge said that Duke had an attorney then and he would not release him. An exception by Duke was noted by the court. (Tr. pp. 44-45; App. 133-34) Duke then made a formal motion that the court release Mr. Fitzgerald which was promptly denied. (Tr. p. 45, lines 17-20; App. 134)

To this point, apart from the selection of the jury, there had been no proceedings in their presence. These proceedings were but the culmination of a single concentrated attempt on the part of Duke to exercise his right under the Constitution to appear as his own counsel and defend against the charge. The attempt began on August 3rd before Fitzgerald was of record in any capacity, when the court first advised Duke to get a lawyer of record if he intended to testify as a witness.

The subsequent proceedings were merely a series of efforts on the part of Duke to effect a reasonable compromise without incurring the displeasure of the trial judge, at the same time preserving his opportunity to effectively defend himself.

Duke continually reiterated his desire to represent himself and the technical formality of associating Fitzgerald as his co-counsel was done in justifiable belief that the matter had been left open pending investigation into the applicable law. In any event, to hold that the right to counsel is so trivially forfeited is to make the constitutional safeguards embodied in the Fifth and Sixth Amendments mere "legal formalisms"

The court indicated on August 3rd, at the outset, and confirmed on August 4th, that under the law Duke had the absolute right to elect to defend in person or by counsel but not both. Duke elected to exercise that right at the first timely opportunity on August 4th when the court for the first time ruled finally on the original issue, i. e., the precise areas in which the court would permit Duke to act in a dual capacity if he had co-counsel.

If Duke at any time had the right to make the choice, as the court indicated the law gave him, then nothing occurred between 10:00 A. M. August 3rd and 10:00 A. M. August 4th which in any way reduced this absolute "right" to a mere privilege subject to revocation in the court's discretion.

The Honorable Trial Judge just didn't want Duke to defend himself. He stated at the outset on August 3rd that if there was any way that he could legally prevent Duke from examining witnesses he would do so. (Tr. p. 35) No doubt the Honorable Trial Judge felt that his rulings were justified to a certain extent because he believed it not wise from Duke's own standpoint for him to represent himself.

No doubt the Honorable Trial Judge was acting from the purest of motives, and perhaps he was just one hundred per cent right. Still, right or wrong, the choice belonged to Duke. The Constitution does not require or authorize as a condition to choosing counsel a subjective evaluation of the wisdom of the choice.

At this stage of the proceedings Duke had no counsel for his assistance. This is not the case of a defendant after conviction in retrospect seeking a technical error to urge on appeal such as in King vs. Smith, 158 F. 2d, 715, (C. A. 9, 1946) Nor is this a case where a defendant had an improper motive as the court specifically found in U. S. vs. Foster, 9 F. R. D. 367.

Duke had one single motive in seeking to defen himself and that was so that he would have a fair opportunity to adequately present his defense to th charge. The court was advised respectfully of these legitimate grounds and it was emphasized that Mr. Fitzgerald was not prepared to adequately conduct the defense and that Duke alone was prepared. Certainly there was no bad faith on Duke's part, and he rightly wanted the matter settled and Mr. Fitzgerald out of the case before the trial commenced in the presence of the jury.

It is submitted that no possible prejudice could have resulted to the prosecution nor was it even suggested. There was just no good reason to forc this man to go to trial hampered in this fashion.

It is therefore respectfully submitted that in this the court just had no discretion, and the trial commenced without constitutional authority as to Duke.

Glasser vs. U. S., 62 S. Ct. 457, 315 U. S. 60

Kretske vs. U. S., 61 S. Ct. 835 313 U. S. 551

Roth vs. U. S., 62 S. Ct. 637, 315 U. S. 827

Kuczynski vs. U. S., 149 F. 2d 478, (7th C. A. 1945)

C. If the trial court had any discretion in refusing to permit Duke to defend himself an abuse occurred and Duke was substantially prejudiced and deprived of a fair trial by reason thereof.

We have previously argued that Duke had an absolute right to elect to defend himself which right he attempted to exercise in good faith. Further, that although the court had authority to control and regulate the manner in which the right was exercised it was not within the court's discretion to prevent the exercise thereof. In the circumstances here we do not believe the trial court had discretion and therefore, the judgment is void irrespective of prejudice.

It is submitted, however, that the record discloses that Duke was in fact substantially prejudiced as a direct result of the court's refusal to allow him to conduct his own defense.

Duke was charged with ten felonies extending over a two year period. The allegations were cast in the language of the statute and conveyed little information by way of detail. The factual situation was exceedingly complicated, particularly in view of the fact that Duke was charged with participating in three separate conspiratorial agreements which overlapped one another, supra, pp. 3 - 5.

If there ever was a case that needed careful factual preparation and a concise clarification of the issues at the outset, this was such a case. Duke wanted particularly to have his defense outlined to the jury at the outset so there would be no confusion. Although the court did authorize

such opening statements, Duke was effectively deprived of any counsel to make one. It is an absolute non sequitur to say that because Fitzgerald was physically present in the courtroom Duke thereby had counsel. There was only one person in that courtroom who was sufficiently prepared on the facts so far as Duke was concerned to give him any effective assistance, and that was Duke himself. The court ruled that here he could not assist himself. Although Mr. Whelan made a few remarks on Duke's behalf while making Ballard's opening statement, he was not counsel for Duke, nor was he prepared to be. Furthermore, the fact that Mr. Whelan represented another defendant and had objected to his client being tried with Duke and Buono necessarily restricted his comments concerning Duke to generalities of a biographical nature.
(Tr. pp. 96-97; 104-112; App. 157-78)

Thus, at the outset Duke was prejudiced by being deprived of a fair opportunity to outline his defense to the jury. The rather general remarks made by Mr. Whelan on Duke's behalf were misinterpreted by the court and the prosecutor, and apparently Mr. Fitzgerald. As a result, the trial went off on a collateral tangent placing Duke in an inextricable prejudicial position.

Although Mr. Whelan said no such thing (Tr. pp. 96-119), it was thought that he had announced that Duke was undertaking to assume the role of a prosecutor and prove by way of a special affirmative defense the existence of an independent conspiracy afoot to frame him. (Tr. 3327-30; App. 492-9

The first suggestion of this sort came from the bench and the prosecutor's side of the table. (Tr. p. 957) However, Mr. Fitzgerald, not being

familiar with the case, concurred in a statement made by the court that it was the court's understanding that Duke was asserting that the prosecution was part of a frame up.

(Tr. pp. 1955-56; App. 344-45)
(Tr. pp. 1960-61; App. 349-50)

Thereafter, efforts to properly discredit the prosecution witnesses by proof of their bias motives in testifying and interest in the case were labeled by the prosecutors as attempts to prove this so-called "special defense"

The matter was placed before the jury through the court's comments (Tr. 957) and prosecutors' statements in the first instance, (Tr. pp. 1955-60; App. 344-50) and then the court called upon Duke, in the presence of the jury, to prove the charge and name those accused.

(Tr. pp. 3207-18; App. 464-474)

Duke then assumed a burden of proof and offered some evidence on the theory that the same rules which the prosecution was authorized to prove a conspiracy applied to him in this instance. The evidence was rejected, but the issue not dropped by the prosecutor. (Tr. pp. 4433-39; App. 657-63) Most of the evidence offered was properly admissible in the absence of any so-called special issue on the theory that it established the bias, prejudice and corrupt motives of the prosecution witnesses.

After Fitzgerald had helped get this so-called "special defense" into the case, he boldly announced that he would have no part of it and didn't believe it. An open breach occurred between Duke and Fitzgerald at this point.

(Tr. pp. 3355-88; App. 500-20)

That afternoon the headlines glared:

"OWN LAWYER SPURNS
DUKE DEFENSE CLAIM"
(Court's Ex. #1)

The breach widened to the point that Fitzgerald called a chambers conference, condemned Duke and asked to be relieved. Duke promptly consented, but after other counsel expressed concern at the effect such an open cleavage would have on their clients in the presence of the jury, which the trial court recognized, Fitzgerald stayed on.

At this chambers conference, which occurred on September 8, 1955, after the trial had been in progress for more than a month, the trial court expressed a willingness for Mr. Fitzgerald to withdraw, and for Duke to then proceed in propria persona.

"THE COURT: Do you wish Mr. Fitzgerald to withdraw, Mr. Duke?

"MR. DUKE: Yes. There has been a situation develop. It is because of the newspaper publicity we can't get away from.

"Maybe your Honor has seen it or maybe you Honor hasn't, where the headlines say, "Own Lawyer Spurns Duke Defense Claim".
(Tr. p. 3897, lines 13-19)

"(THE COURT): * * * Because there has been an area of disagreement between Mr. Duke and Mr. Fitzgerald in this case, I permitted a division of duties and labors in the courtroom * *
(Tr. p. 3899, lines 13-15)

"* * * Now, what are you going to do about counsel, Mr. Duke, if Mr. Fitzgerald withdraws at this time?

"MR. DUKE: I will proceed in propria persona, as I intended to do when I came into the case. As your Honor recalls, I made a similar motion at the beginning of the case.

"Mr. Fitzgerald volunteered his services, to come down and help me over the rough spots; not to take over the trial of the case.

"I am sure some of these statements that have been made by Mr. Fitzgerald were made through his lack of knowledge of the evidence that I had within my command. That situation was called to the court's attention, I believe, at the beginning of the case and I believe Mr. Bowler objected to my even participating as associate counsel."

(Tr. pp. 3899, line 22 - 3900, line 10)

"MR. WHELAN: I am mindful of the precarious position of my own client in this case, and I am mindful of the condition in which Mr. Buono finds himself and what the effect may be on the jury if this thing does come to an open break and Mr. Fitzgerald is no longer in the case. And I still think we have got some kind of a chance to win, and I don't like to see it --

"THE COURT: Could we do this, even if the motion be granted: Have Mr. Fitzgerald present in the courtroom, although not participating, in order that there be no open break to the eye of the jury."

(Tr. pp. 3902, line 17 - p. 3903, line 2)

At this stage of the trial and in view of the prejudicial effect that counsel felt Mr. Fitzgerald's release would have on the other defendants, Duke and Fitzgerald tried to patch things up and go ahead together. (Tr. p. 3906)

Now, we do not propose to even inquire into the respective merits of the position of either Fitzgerald or Duke concerning their disagreement. The fact remains, they did disagree; the fact remains, that such disagreement was apparent to the court; and the fact remains, that the court recognized the prejudicial effect in the presence of the jury of Mr. Fitzgerald leaving the case at that stage; the fact remains, that Duke recognized at that time that this confusion had been the result of the original rulings at the outset of the trial when the court compelled Duke to proceed to trial with Mr. Fitzgerald.

In Glasser vs. U. S., 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680, the court stated:

> "Even as we have held that the right to the assistance of counsel is so fundamental that the denial by a state court of a reasonable time to allow the selection of counsel of one's own choosing, and the failure of that court to make an effective appointment of counsel, may so offend our concept of the basic requirements of a fair hearing as to amount to a denial of due process of law contrary to the Fourteenth Amendment. * * *
>
> "* * * The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."

From the record it appears that at the outset Duke lacked sufficient confidence in Mr. Fitzgerald, and was not willing to proceed to trial with him if it required relinquishing full control of his case. Irrespective of the merits of this controversy, it appears that even Mr. Fitzgerald did not consider that the relationship of attorney-client existed between himself and Duke, otherwise, we believe he would have quietly withdrawn rather than publicly "spurn" a client in the middle of a trial.

In U. S. v. Mitchell, 137 F. 2d 1006, defendant therein attempted to dismiss his counsel on the second day of a three day trial. This request was denied. On appeal the defendant's conviction was upheld, the court emphasizing that defendant had failed to express a reason for his request and that he had further failed to disclose whether he wish to proceed without counsel or desired to have the trial delayed while he secured new counsel. The court, however, then made the following rather appropo observation:

> "Presumably if an accused during the trial decides that he wishes to proceed alone and without delaying the trial and makes his decision with full knowledge of the risks he is taking . . . that course should be open to him in view of the fact that he must have confidence in his counsel."

It is respectfully submitted that the court had no discretion to refuse to permit Duke to defend himself and the judgment, therefore, is void. If, however, the court did have any discretion, there was an abuse which resulted in substantial prejudice and the judgment should therefore be reversed.

II.

DUKE WAS SUBSTANTIALLY PREJUDICED AND DEPRIVED OF A FAIR TRIAL BY REASON OF VARIOUS ERRORS IN THE COURT'S RULINGS AND COMMENTS, AND BECAUSE OF THE MISCONDUCT OF THE PROSECUTING ATTORNEY IN THE PRESENCE OF THE JURY, ALL OF WHICH RELATED TO A MATTER COLLATERAL TO THE ISSUES IN THE CASE.

We have previously related the circumstances with respect to the interjection into the case of the so-called "Duke special defense". We related at pages 55 and 56, supra, how the matter came into the trial, in the first instance, by comments from the court and prosecutor, and Mr. Fitzgerald's concurrence.

Now it is readily conceded that Duke accepted with considerable reluctance and to a very limited degree the invitation of the court, made to him in the presence of the jury. However, the precise necessity of the lengthy comment and colloquy in the presence of the jury is not readily apparent from the record. It would seem that a chambers conference outside the presence of the jury would have been more appropriate for clarification of such issues. This colloquy (Tr. pp. 3205-18) is quoted in the Appendix, Volume 4, at pages 463 to 474.

Although invited to go further, all Duke in effect said was that I know the witness John Hadzima is framing me, and I think Mr. Sankary, his wife, Wanda, some labor officials, and Mr. Vader of the Customs Agency are acting

in concert with Hadzima. (Tr. pp. 3209-10)

Duke declined to make any charges against Mr. Steward or the United States Attorney's office and expressed the thought that they were being misled. (Tr. p. 3210)

Now let us examine this business of a "special defense" of "frame up". Duke said Hadzima was framing him. There is certainly nothing special or unique about that contention because all Duke is saying is -- "I am not guilty". Here Hadzima, in his testimony, had charged Duke with criminal conduct. Duke testified that this was not true. Here we have diametrically opposed testimony. Either Hadzima or Duke deliberately and wilfully testified falsely, and there is no area for mere mistake or inadvertence. Duke says, "I am not guilty -- I am telling the truth, and Hadzima did not."

Now Hadzima is either testifying truthfully, or he is framing Duke. There is nothing special about that. For Duke to say -- "I am not guilty but Hadzima is not framing me" would be tantamount to pleading guilty in the presence of the jury.

As far as the United States Attorney's Office is concerned, they are either participants in a frame up, or they are being misled. It is just as simple as that, because for Duke to say they are neither participants nor being misled is tantamount to his pleading guilty. Duke said they were being misled.

As for Sankary, Mr. Vader and labor officials, unnamed, Duke said he believed they were acting

in concert with Hadzima, and Duke went on to say that Hadzima himself had made the charges. (Tr. p. 3209)

If such was in fact the case evidence thereof would be admissible as tending to prove the bias, prejudice and corrupt motive of the witness Hadzima.

Thus, we submit that under critical analysis this label "special affirmative defense" is a complete misnomer, and irrespective of what Duke may have believed, be he justified or not in such beliefs, there was no basis or justification for giving him this separate and special classification. The specific errors assigned in connection therewith follow:

A. It was misconduct for the prosecuting attorney to call a witness to the stand not to elicit any material evidence but solely for the purpose of disclosing to the jury that Duke had subpoenaed the witness but failed to call him to testify.

Duke had subpoenaed Morris Sankary, but did not call him as a witness. So that the jury might be advised of this, Mr. Steward called Sankary as a witness and elicited from him the fact that he had been subpoenaed by Duke but not called to testify. The examination of Sankary is quoted in part in the Appendix at pages 607-614. (Tr. pp. 3803-6) Mr. Steward was laying the foundation for what we contend was an improper argument as set forth under aseparate heading below. This was error.

Milton vs. U. S., 110 F. 2d 556

B. The prosecuting attorney committed misconduct during argument to the jury in that he stated facts concerning Duke which not only were not in evidence but which were known by him not to be true; and the argument was intemperate and inflammatory and calculated to cause the jury to substitute passion and prejudice for reason in viewing the evidence as to Duke.

Particulars of the Opening Argument only of the prosecutor were assigned as misconduct and they are quoted in the Appendix at pages 657 to pages 663, and reference is made thereto. (Tr. 4433-4445) In substance, Mr. Steward told the jury that Duke had accused himself, the United States Attorney's Office, Mr. Bowler, the United States Customs Service, citizens in San Diego, and the Federal Grand Jury of participating in a conspiracy to frame Duke. (Tr. pp. 4433-4435)

Now this is just simply not true, and Mr. Steward knew it was not true. The very most that can be said is that when called upon (and not before) Duke said Hadzima was framing him, and that based on what Hadzima said, he believed Sankary and wife, Mr. Vad and some unnamed labor officials were participating. Duke expressly took the position that the United States Attorney's office, including Mr. Steward, was being misled. Now there was just no excuse for these statements. The jury having heard what Duke said in the courtroom could not help but assume that Mr. Steward was relating facts of his own knowledge of what must have occurred during one or more of the sessions outside their presence.

This was improper and in the circumstances here, highly prejudicial.

It was stated in Berger vs. United States, 295 U. S. 78, 88 (55 S. Ct. 629, 79 L. Ed. 1314):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all . . ."
>
> ". . . It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In another part of his Opening Argument, Mr. Steward berated Duke for failing to call Mr. Sankary as a witness. (Tr. p. 4434) In "A" above, we pointed out that Mr. Steward called Sankary to the witness stand solely to advise the jury that Duke had not called him. Mr. Steward said that he, himself, was on the witness stand as was Mr. Vader (both were called by defense for a limited purpose) and that Duke was afraid to ask either of them any questions about this frame up. (Tr. p. 4434)

Mr. Steward said it was the truth that Duke participated in the bird smuggling venture and the Grand Jury indicted him for doing that. (Tr. pp. 4444)

Mr. Steward then outlined to the jury the subjective thoughts that he had when he was interviewing the prosecution witnesses, and in effect advised the jury that if he had not believed them, the prosecution would not have commenced. (Tr. pp. 4463 - 4464) This was improper argument.

See the following decisions of the California Supreme Court:

People vs. Pantages, 212 Cal. 239

People vs. Cook, 149 Cal. 334

The remarks of the prosecutor were assigned as misconduct. The court held that there was no misconduct, commenting, however, that it would have been better to have reserved the remarks until closing argument. (Tr. 4447-51; App.663-70)

It is respectfully submitted that the remarks of the prosecutor exceeded the bounds of propriety and had the effect of depriving Duke of a fair trial.

C. The prosecuting attorney committed misconduct in the cross-examination of Duke by asking improper questions solely for the purpose of getting the matter before the jury.

In cross-examining Duke Mr. Steward asked the following:

" Q Isn't it also true in that conversation you were asked whether or not you knew these defendants of yours were smuggling birds?

"A No, Mr. Steward, I wasn't asked that question.

"Q Didn't you reply in the presence of Mr. Sankary and Mr. Vader and Mr. Buono, 'I know they are smuggling birds. You know they are smuggling birds. If called to testify, I will get on the stand and lie about it'?

"A No, sir, I did not. And I will take a lie detector test, sir."
(Tr. p. 2856; App. 454-55)

Here Mr. Steward made no effort to prove the fact stated in this question. Although he had called Mr. Sankary to the stand in order to get improper evidence before the jury, he did not question him in a proper area, i. e., complete the attempted impeachment. Mr. Vader, though available, was not even called as a witness by Mr. Steward. The question did the damage, and Mr. Steward obviously did not care about the answer. This was improper.

Berger vs. United States, 295 U. S. 78
55 S. Ct. 629

At another point in this cross-examination, Mr. Steward asked Duke a question concerning his finances. Fitzgerald object, and was sustained. Duke requested permission to answer, and Fitzgerald withdrew the objection. Mr. Steward then withdrew the question. (Tr. 4181-83)

D. The court erred while instructing the jury in commenting on the so-called "special defense"

In instructing the jury at the conclusion of all arguments, the court stated:

> "It has been said here by some of the counsel that certain of the Government witnesses have, in effect, conspired together to tell false stories. . .
>
> "But it has been strongly suggested to you by some of the counsel that certain of these witnesses did conspire together, and in that connection you should consider that accusation. Consider whether the situation of those witnesses was such that they would have the opportunity to do so.

"What access they had to each other and what lack of access they had to each other. (Tr. p. 5089; App. 675)

Exception was taken by Duke. Although the exception only states a portion of the remarks, it appears sufficient to direct this Honorable Court's attention to the entire subject. (Tr. p. 5108)

It is submitted that it was improper to continually bring this matter before the jury to the very end of the case. Query: For what reason should the jury "consider that accusation" the court having ruled that there was no affirmative evidence to support it ?

E. The court erred in refusing to admit evidence bearing on the bias, prejudice and corrupt motive of the witness Hadzima.

Duke attempted to cross-examine Hadzima to lay a foundation to prove that during the trial the witness had related a number of facts in a telephone conversation disclosing a corrupt motive in testifying in this case. The Court ordered Duke to prove the matters affirmatively in his case, and not cross-examine the witness with respect thereto. Duke complied. (Tr. pp. 956-57; App. 242-43) Thereafter, when Duke offered to prove the witness' statements affirmatively to establish facts tending to prove that the witness testified from corrupt motives, the court refused to permit the evidence to be considered for that purpose. (Tr. pp. 2035-99; App. 361-91) (Tr. pp. 2657-59; App. 452-54)

The court permitted the evidence of the witness' declarations to be considered only for the purpose

of impeaching the statements of the witness under oath, and for which a proper foundation had been laid. (Tr. pp.4291; 5100-5101) The motives, bias and prejudice of the witness Hadzima were sought to be proved by evidence of his extra-judicial declarations with reference thereto. This evidence was limited by the court to strict impeachment of Hadzima.

The testimony and offers of proof made in connection therewith, and the rulings of the court thereon are quoted verbatim in the Appendix filed in connection with this brief. In view of the fact that it would exceed the limits allowed for this brief to repeat the testimony and offers of proof verbatim here, we therefore refer to the Appendix where it appears. The appropriate official record citations are set forth in the Appendix.

1. Testimony of Buono concerning statements made to him by Hadzima.
Appendix, Vol. 3, pages 338 to 357.

2. A disc record of a telephone conversation between Duke and Buono and the witness Hadzima.
Appendix, Vol. 3, pages 361 to Vol. 4, page 39

3. Testimony of the witness Jack Hanna with respect to Hadzima's extra-judicial statements.
Appendix, Vol. 5, page 495 to page 570.

It is respectfully submitted that the offers of proof in each instance as made to the trial court, and quoted verbatim as urged, should have been accepted and the evidence received for the purpose offered.

This is especially so in view of the fact that the court expressly directed Duke to prove such matters

affirmatively instead of questioning the witness Hadzima on cross-examination to lay the foundation to prove his bias, prejudice and corrupt motive. (Tr. pp. 956-57; App. 242-243)

The rule is properly stated by the Honorable Charles W. Fricke, Judge of the Superior Court of Los Angeles County in his well known text, California Criminal Evidence, Third Edition, 1954, at page 416.

> "One of the means of impeaching the testimony of a witness is by proof of his bias, motive or interest but this does not mean that without any prior foundation a party may introduce such evidence. . . when it is sought to impeach a witness by proof of his bias, motive or interest the inquiry is not limited to matters material to the issues in the case on trial."

F. It was error to refuse to permit proof that just prior to the trial the witness Helm was engaged in illegal conduct in violation of the laws of the United States for which he had not been prosecuted.

Helm was cross-examined with reference to his activities on July 30, 1955. On that day Helm crashed an airplane in Mexico. When the plane left the United States, it was loaded with Scotch whisky.

Helm contended that he was involved in a legal importation and produced a copy of custom document (D's. ex. J.), the original of which he stated he had signed and filed with U. S. Customs prior to departure. The document disclosed that

the whisky was being imported by a Mexican company named "Importadora de Sinaloa" and that the plane and cargo were destined for Sinaloa. Helm testified that he was actually destined for Mexicali, but that he had engine trouble and crashed in a desolate area in Mexico about three miles from the border.

Helm described his crash as a controlled crash landing, and he specifically denied that he landed, unloaded the whisky and then crashed taking off.

After Helm crashed he called Mr. Vader of the Customs service, who drove out and picked him up. Helm spent the night in Mr. Vader's home and the following day was interrogated at length by both Mr. Vader and Mr. Steward. Helm said that in 1953 and 1954 he had disclosed his smuggling activities to Mr. Vader and had discussed the subject with him during 1954 and 1955.

However, Helm said he gave his first complete statement on July 31, 1955. When asked what information he added to his July 30, 1955 statement that he had not previously told them, Helm said "regarding Vic Buono and Clifford Duke". (Tr. pp. 1405-1407)

Evidence was offered to prove that on July 31, 1955, Helm was in fact engaged in a smuggling transaction and had filed a false declaration with U. S. Customs. That he had landed with the whisky in the desolate spot in Mexico, unloaded it and while taking off crashed.

Further proof was offered to show that the Mexican company Importadora de Sinaloa was in

fact non-existent. The prosecutor argued to the jury that this was another attempt by Duke to malign Mr. Vader, and that they had proven that the transaction was perfectly legal.

The court ruled the evidence immaterial. The testimony and offer of proof and court's rulings thereon are set out verbatim in the Appendix as follows:

Appendix, Vol. 3, pages 263 - 269
Vol. 3, pages 271 - 282
Vol. 4, pages 394 - 430
Vol. 5, pages 614 - 620
Vol. 5, pages 631 - 637

It is respectfully submitted that the evidence was material as proving the motive and bias of the witness Helm, and should have been admitted. The proper foundation was laid on cross-examination of Helm, and it was error to refuse to permit the proof to be completed.

Farkas vs. United States, 2 F. 2d 644

III.

THE COURT ERRED IN PERMITTING HADZIMA TO HAVE THE ADVICE OF PRIVATE COUNSEL WHILE ON THE WITNESS STAND DURING CROSS-EXAMINATION.

While John Hadzima was on the witness stand he was permitted, over objection, to have his private attorney, Harold Lasher, present to confer

with him. (Tr. pp. 466-67; 698-99) On his direct examination Hadzima claimed that he paid Duke sums of money in 1953 and 1954. No objection was interposed by his attorney, Mr. Lasher. On cross-examination Duke questioned Hadzima with reference to his finances during the years 1953 and 1954.

Mr. Lasher, over objection was permitted to confer with Hadzima privately while he was on the witness stand before answering the questions propounded by Duke. Objection was made that this conduct deprived the defendant of the right of cross-examination. The objection was overruled. (Tr. pp. 931-34) Furthermore, during this time Mr. Lasher made comments to the court in the presence of the jury with reference to the purpose of Duke's questions to Hadzima. (Tr. p. 934)

While Mr. Whelan was cross-examining Hadzima, Lasher interrupted, conferred with Hadzima privately, and then Hadzima stated he wished to correct a previous statement. (Tr. pp. 889-90)

The proceedings during this phase of Hadzima's cross-examination are set forth in the Appendix, beginning in Volume 2, page 224 to Volume 3, page 240. This was error. Defendants were entitled to have the testimony of the witness, not his counsel.

V.

THE JUDGMENT IN COUNTS II, III, V & VI; VIII, IX & X; IMPOSING CONSECUTIVE PUNISHMENTS SHOULD BE REVERSED BECAUSE INSUFFICIENT FACTS ARE ALLEGED IN THOSE COUNTS TO CONSTITUTE ANY OFFENSE PUNISHABLE UNDER THE LAWS OF THE UNITED STATES.

Appellant submits that the indictment on its face is fatally defective because:

1. Psittacine birds are not "merchandise which should have been invoiced." Under the Code of Federal Regulations psittacine birds could not have been imported into the United States except in the manner and under the exceptions allowed in Section 71.152 of Title 42 of the Code of Federal Regulations. Therefore, to require entry and invoicing of psittacine birds 48 hours after importation would in effect compel a person to accuse himself of a crime, to wit: a violation of the Code of Federal Regulations with reference to the importation of psittacine birds.

2. The allegation that psittacine birds were brought in contrary to United States Code, Title 19, Chapter 4, and particularly Sections 1461 and 1484, is not sufficient because no fact or facts are alleged which would show unlawful importation, or a violation of these sections. Furthermore, such allegations are vague and ambiguous because Chapter 4 of Title 19 of the United States Code contains more than two hundred sections with numerous prohibitions, the violation of each of which is a crime calling for a certain

specified penalty. The penalty in some instances is a nominal fine and in others imprisonment for as long as five years.

Steiner, et al., vs. United States, 229 F. 2d 745 (C. A. 9, 1946)

Babb vs. United States, 218 F. 2d 538

U. S. vs. Kushner, 135 F. 2d 668

Sutton vs. U. S., 157 F. 2d 661

In Steiner, et al. vs. United States, supra, this Honorable Court approved the decision in the Babb case, supra, and reversed the judgment of conviction on the substantive counts, because the allegation "contrary to law" was insufficient and could not be cured by a request for a bill of particulars.

It is respectfully submitted that the allegations stating that merchandise was imported contrary to certain provisions of the United States Code is no different than the allegation "contrary to law".

CONCLUSION

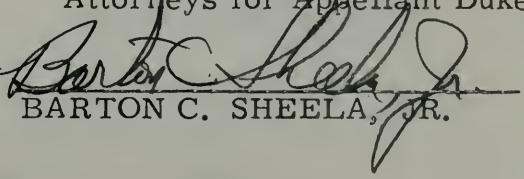
For the reasons set forth in Topic I, this Appellant was deprived of his right to counsel contrary to Articles Five and Six of the Amendments to the United States Constitution, and by reason thereof, the judgment of conviction is void and should be set aside by this Honorable Court. In any event, if the court had any discretion in the matter of this Appellant's right to defend himself, certainly it was an abuse in this instance resulting in substantial prejudice, and the judgment should therefore be reversed.

Therefore, for the reasons set forth above, and for the further reasons set forth in the other errors specified, it is respectfully urged that the judgment of conviction and the order of the trial court denying the motion for new trial be reversed and set aside.

Respectfully submitted,

BARTON C. SHEELA, JR.
GEORGE WMS. RUTHERFORD
CLINTON F. JONES

Attorneys for Appellant Duke

By 
BARTON C. SHEELA, JR.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN DIEGO)

THOMAS WHELAN, being first duly sworn, deposes and says:

That he is a citizen of the United States; an attorney at law licensed to practice in the County of San Diego, State of California with offices at 413 Orpheum Theatre Building, San Diego, California; that he is over the age of eighteen years and is not a party to the above entitled action;

That on August 20, 1956, he deposited three copies of the Opening Brief on behalf of Clifford L. Duke, Jr., Docket Number 15146, in the U. S. Mail at San Diego, California in a parcel bearing the requisite postage, addressed to MR. HARRY STEWARD, Assistant United States Attorney, 325 West "F" Street, San Diego, California, his last known address, at which place there is regular communication by United States Mail.

THOMAS WHELAN

Subscribed and sworn to before me, this 20 day of August, 1956.

Mary Hanby Duke

Mary Hanby Duke
Notary Public in and for the said County and State.
My commission expires June 11, 1957.
(Seal)